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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-833

ERNEST DACOSTA,

Petitioner,

—against—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, ROBERT FROEHEKE, individually, and as Secretary of the Army of the United States, and COL. JAMES T. ANDERS, individually, and as Chief of Staff, United States Army Infantry Training Center, Fort Polk, La.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Ernest DaCosta prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on October 1, 1971.

Citation to Opinion Below

The opinion of the United States Court of Appeals is reported at 448 F.2d 1368 (2d Cir. 1971) and is printed in the Appendix, *infra*, at pp. 1a-5a. The judgment of the United States District Court for the Eastern District of

New York is unreported and is printed in the Appendix, *infra*, p. 6a. The District Court issued no opinion, relying upon its earlier decision in *Orlando* v. *Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 1, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Constitution, Article I, Section 8, Article II, Section 1, Article II, Section 2

Gulf of Tonkin Resolution ("Joint Resolution to promote the maintenance of internal peace and security in Southeast Asia," P.L. 88-408, 78 Stat. 384, August 10, 1964)

Foreign Military Sales Act (P.L. 91-672, 84 Stat. 2053, January 12, 1971), Sec. 12

Defense Supplemental Appropriations Act, 1965 (P.L. 89-18, 79 Stat. 109, May 7, 1965)

Supplemental Defense Authorization Act, 1966 (P.L. 89-367, 80 Stat. 36, March 16, 1966), Sec. 401(a)

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Draft Extension Act of 1971, Title IV (P.L. 92-129, 85 Stat. 361, September 28, 1971)

Military Procurement Authorization Act for 1972, Title VI (P.L. 92-156, 85 Stat. 430, November 17, 1971)

(See Appendix B for text of above provisions.)

Questions Presented

1. Whether the Constitution, in specifically granting Congress the power to declare war, permits the Executive to initiate and prosecute large-scale foreign military hostilities without the express authorization of Congress?

2. Whether (a) the Gulf of Tonkin Resolution (despite its subsequent repeal); (b) military appropriations acts; or (c) any other acts of Congress constitute sufficient implied authorization of the Vietnam War to comply with the Constitution?

3. Whether the Executive may continue to wage war in Vietnam in the absence of express Congressional authorization in light of (a) the direction of Congress contained in Title VI of the Military Procurement Authorization Act (P.L. 92-156) and Title IV of the Draft Extension Act of 1971 (P.L. 92-129) that the Executive terminate hostilities in Vietnam; (b) the repeal of the Gulf of Tonkin Resolution; and (c) the revelations of Executive duplicity contained in the Pentagon Papers?

4. Whether the Executive Department may conscript troops to fight in a foreign war despite the lack of express Congressional authorization for such a war?

Statement of the Case

This case presents a challenge on the merits to the constitutionality of the Executive's waging of the Vietnam War. Prior litigation has established that the basic legal issues of the war are justiciable; that a soldier with military orders for deployment to Vietnam has standing to challenge those orders in a federal court and that the Executive lacks inherent authority to wage war without the assent of Congress. The issue is now ripe for adjudication as to whether Congress has granted its assent to the war in Vietnam in accordance with the procedures mandated by the Constitution.

Moreover, in addition to the underlying issue of the Vietnam War's legality in the absence of express Congressional authorization, three additional questions of critical importance are raised herein.

First, may the Executive conscript troops to fight in a war which has not been expressly authorized by Congress, or must the Executive rely upon volunteer manpower to carry on such a military undertaking?

Second, may the Executive ignore express Congressional limitations placed upon the waging of a war which Congress has never explicitly authorized?

Finally, may the Executive continue to assert that Congress has, in fact, impliedly authorized the Vietnam War in the face of the revelations contained in the Pentagon Papers demonstrating a pattern of Executive duplicity concerning the true state of facts which existed in Vietnam?

Prior Proceedings

Plaintiff-appellant, Pvt. Ernest DaCosta, a citizen of Portugal and a permanent resident of the United States, resides in Jamaica, New York. He was conscripted into the United States Army on December 3, 1970, for a period of two years.

After receiving advanced infantry training at Fort Polk, Louisiana, Pvt. DaCosta was ordered to report to Fort Lewis, Washington, for shipment to Vietnam on August 5, 1971. While home on leave, Pvt. DaCosta commenced this action on July 23, 1971 in the United States District Court for the Eastern District of New York. After both sides cross-moved for summary judgment, the District Court granted the government's motion for summary judgment, relying primarily upon its prior opinion in *Orlando* v. *Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970).

Pvt. DaCosta thereupon moved the Second Circuit for an expedited appellate hearing on his original record. The government cross-moved for summary affirmance in the light of *Orlando* v. *Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 40 LW 3166 (October 12, 1971). The government's motion for summary affirmance was denied and the case set for plenary argument on an expedited schedule. The case was argued on September 17, 1971 and a decision rendered on October 1, 1971.[1]

[1] The government originally acceded to the Second Circuit's request (made on August 9, 1971) that Pvt. DaCosta be retained in the United States pending a decision of the court. When the government refused to continue to keep petitioner in the United States following argument on September 17, 1971, the Second Circuit issued a stay of petitioner's orders until its decision on October 1, 1971. A further request for a stay was presented to Mr. Justice

The Second Circuit below affirmed its prior decision in *Orlando*, *supra*, which had upheld the legality of the Executive's waging of the Vietnam War. The court dismissed the effect of repeal of the Gulf of Tonkin Resolution, stating:

> "there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution." 448 F.2d at 1369, Appendix, pp. 2a-3a.

The court did not consider the revelations in the Pentagon Papers:

> "appellant's claim that the so-called 'Pentagon Papers' revealed that there was in fact no mutual participation between Congress and the Executive as stated in the *Orlando* decision is not properly before us. The 'Pentagon Papers' were not a part of the record in this case, nor was there evidentiary material in support of their authenticity." *Ibid.* at 1370. Appendix, p. 4a.

Marshall on October 3, 1971. That request was denied on October 13, 1971. Petitioner was thereafter sent to Vietnam where he is presently on duty.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

There is little doubt that the Vietnam War is the most disturbing and troublesome issue of our times. It has divided and agitated American society not only because a great many citizens now question the wisdom of our efforts in Southeast Asia, but because the legality and constitutionality of American military involvement in Vietnam is in serious question. Millions of Americans feel that we have become embroiled in Vietnam through procedures which have failed to satisfy constitutional norms. Thus, they view the struggle in Vietnam not as the lawful expression of the nation's will but as an unlawful exercise in naked power. As Senator Sam Ervin has said:

> "The consequences of this failure to observe the Constitution are all too evident. True, no Supreme Court decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory, an incumbent President was forced from office.
>
> Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandinavia rather than bear arms in the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon. Now we have riots and violence on our university campuses. ROTC

programs are being forced out of schools, and there is dissension and antiwar activity even among those in uniform.

Perhaps not all the anarchy we see today has been caused by the Vietnamese war and the way in which we became involved. No one can say. But no one can say that the war was not the cause, or at least the catalyst. And I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam." 115 Cong. Rec. 17217 (June 25, 1969).

Reflecting Senator Ervin's perception that much of the divisiveness flowing from the war in Vietnam stems from the war's questionable legal basis, virtually every political figure in the nation has offered an opinion on the war's legality. Charges of "Executive usurpation," "Congressional pusillanimity," "Constitutional crisis" fly back and forth in the Congress and on the editorial pages throughout the nation. Many state legislatures have passed or are considering special laws to protect their citizens from service in Vietnam, with a view to obtaining a court test of the war. (See *The New York Times*, May 2, 1971, p. 40.) Until the Second Circuit spoke in the *Orlando* case, there was silence from the one organ of government vested with responsibility to speak authoritatively on the proper allocation of constitutional responsibility between the Executive and the Congress—the Federal judiciary.

The silence of the courts on this issue meant that a soldier—like the petitioner herein—who has been ordered

to go to Vietnam to risk his life in what he claims is an illegal war had no forum to hear his complaints. For the federal courts to avoid their responsibility of hearing the constitutional complaints of the citizens most directly affected by the Executive's actions is to deny the very purpose for which they were instituted.[2]

The silence of the courts on the issue of the Executive's authority to wage war in Vietnam has not led to any resolution, or to any hope of resolution, of the problem by the other branches of government.

The Executive continues to insist that it has inherent authority to wage war and is not bound by Congressional actions taken to end it. Consequently, although Title VI of the Military Procurement Authorization Act of 1971 (P.L. 92-156) declared it to be "the policy of the United States to terminate at the earliest practicable date all military operations in Indochina . . . subject to the release of all American prisoners of war," President Nixon announced that he did not feel bound by the policy enunciated by Congress. See Point VI, *infra*, at pp. 25-27.

For the two "political" branches to view their respective rights and responsibilities in such diametrically opposed ways is to encourage conflict and uncertainty in an area where harmony and strict lines of responsibility are necessary for the security of the nation.

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[2] James Madison stated when he introduced the Bill of Rights into Congress: "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights (in the Bill of Rights); they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment of rights expressly stipulated for in the Constitution by the declaration of rights." 1 *Annals of Congress*, 1st Cong., 1st Sess. 439.

I.

The conflicts among the lower courts and among the coordinate branches of government as to the jurisdiction of the federal courts to review the Executive's war powers and the constitutional standards to be applied require a definitive resolution of the issues involved.

The current state of the law relating to the meaning of Article I, Section 8, clause 11 of the Constitution and the ability of the courts to review the constitutional reach of the Executive's war power is in conflict and remains totally unsatisfactory.

First, a basic disagreement has arisen between the Circuits as to the justiciability of a contention that no Congressional authorization exists for the waging of the Vietnam war.

The Second Circuit in the *Orlando* case and the First Circuit in *Massachusetts* v. *Laird*, —— F.2d —— (First Cir. 1971) rejected the government's contention that challenges to the legal sufficiency of the Executive's waging of war in Vietnam posed nonjusticiable issues. This view of jurisdiction has been adopted by a District Court in the Northern District of California, *Mottola* v. *Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970).

The District of Columbia Circuit has reached a diametrically opposed jurisdictional position in *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (D.C. Cir. 1967), *cert. den.* 387 U.S. 945 (1967). The District of Columbia Circuit's jurisdictional position has been accepted by District Courts in Kansas and Virginia, *Velvel* v. *Johnson*, 287 F. Supp. 846 (D. Kans. 1968); *Davi* v. *Laird*, 318 F. Supp. 478 (W.D. Va. 1970).

Among those courts reaching the merits of the challenges to the war in Vietnam, equally contradictory results have occurred. Judge Dooling in the *Orlando* case found that the Gulf of Tonkin Resolution lacked compelling significance as authority to wage war in Vietnam. 317 F. Supp. at 1019. Judge Judd disagreed in the companion *Berk* v. *Laird*, 317 F. Supp. 713, 723 (E.D.N.Y. 1970), *aff'd* 443 F.2d 1039. The Second Circuit cited the Tonkin Gulf Resolution as authority for the war in the *Orlando* case but held below in *DaCosta* that it was not the crucial Congressional authorization. Finally, the District Court in *Mottola* stated that the Tonkin Gulf Resolution "falls far short of a declaration of war, or even of implied authorization for the kind of all out full scale war subsequently launched by the President in Vietnam." 318 F. Supp. at 544.

The Second Circuit below relied primarily on the appropriation of funds for the Vietnam war and the extension of the draft as constitutionally sufficient manifestations of Congressional assent to the war. However, this ground was explicitly rejected by the *Mottola* court. 318 F. Supp. at 543. More importantly, that ground of the Second Circuit's decision was severely criticized on the floor of the Senate by the Chairmen of both the Foreign Relations Committee and the Armed Services Committee, who expressed consternation at the court's opinion in *Orlando*, 117 Cong. Rec. S8320-23 (daily ed. June 4, 1971).

This exchange on the floor of Congress reflects the great division that exists between the coordinate branches of government on the reach and meaning of the war power clauses of the Constitution. The Executive has consistently maintained that it possesses "inherent authority" to prosecute

large scale military operations in the absence of Congressional authorization by virtue of its control of the nation's foreign policy and its role as Commander-in-Chief of its armed forces. See generally, comments of President Nixon quoted *infra* at pp. 25-26; Brief of the Solicitor General in *Massachusetts* v. *Laird*, No. 43 Orig., October Term, 1970, pp. 18-24; televised interview of President Nixon on July 1, 1970 reported at 117 *Cong. Rec.* S8761 (daily ed. June 10, 1971). See also 116 *Cong. Rec.* S9598, 9591 (daily ed. June 23, 1970); 116 *Cong. Rec.* S21850 (daily ed. January 2, 1971).[2]

Members of Congress have categorically rejected the existence of inherent Executive authority to wage war and have severely criticized the Second Circuit's ruling that Congressional approval of the Vietnam war may be implied from the passage of appropriations bills and the extension of the draft. An amendment was introduced into the Senate to negative the Second Circuit's opinion in *Orlando* but it was then withdrawn as unnecessary. See 117 *Cong. Rec.* S9685-89 (daily ed. June 22, 1971). The action of Congress in passing the Mansfield Amendment as part of the Draft Extension Act, Title IV (P.L. 92-129, 85 Stat. 348) and the Military Procurement Authorization Act discussed in Point VI, *infra*, at pp. 25-27 shows that

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[2] All the courts that have examined the matter have firmly rejected the idea that the President could wage a war of Vietnam dimensions without the authorization of Congress. The Second Circuit noted: "If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with Article I, section 8." *Berk* v. *Laird*, 429 F.2d at 305. See also Judge Dooling's opinion in *Orlando*, 317 F. Supp. at 1016; Judge Sweigert's opinion in *Mottola*, 318 F. Supp. at 541.

Congress disagrees with the Executive's interpretation of its war powers. See, in addition to the debates noted above, remarks of Senator Alan Cranston, 116 *Cong. Rec.* S11818 (daily ed. July 21, 1970); Senator George S. McGovern, 116 *Cong. Rec.* S11987 (daily ed. July 23, 1970); Senators Mark Hatfield and J. William Fulbright, 117 *Cong. Rec.* S8044 (daily ed. June 2, 1971). See also statement of Senator Richard Russell, 112 *Cong. Rec.* 3135 (February 16, 1966).

The Executive itself has taken inconsistent positions on the legal basis of the Vietnam War. The State Department represented to Congress that the Gulf of Tonkin Resolution was unnecessary for the prosecution of the war. See Letter from H. G. Torbert, Jr., Acting Assistant Secretary of State for Congressional Relations to Senator J. William Fulbright. Quoted in Senate Report No. 91-872, 91st Cong., 2d Sess. 20, 23 (1970).

Despite these disclaimers, the government has urged in the courts *in every single case in which the issue has arisen* that the Gulf of Tonkin Resolution was the primary constitutional basis for the war—even after its repeal.

The inevitable result of the inconsistent positions concerning the constitutional basis for the war is to perpetuate the national confusion over its legality and to intensify the bitterness of the national debate over its continuation. Indeed, the only point that has clearly emerged from the welter of conflicting opinions over the legal basis for the war is that unless and until this Court clarifies the constitutional allocation of powers between the Congress and the Executive in the area of war and peace, confusion and uncertainty must plague any future consideration of the war in Vietnam and cast doubt upon future commitments of American military resources to combat.

II.

The decision below raises vital questions on the scope of the Executive's war powers; the courts' resolution of those questions was incorrect.

One of the most important constitutional questions that can face this nation is how we go to war. It would appear that the Constitution settled this matter as definitively as possible in Article I, Section 8, clause 11 which states that "The Congress shall have Power . . . To declare War . . ." Yet the court below held that Congress need not do the actual decision-making in the field of war or peace.

The court's ruling is nothing less than revolutionary; for it amounts to a complete shifting of a vital constitutional power from one branch of the government to another.

Essentially, the ruling below was that Congress may exercise its war power by implication from collateral acts supportive of the war, such as the passing of military spending bills or extensions of the draft. Thus, a central question raised by this appeal is whether Congress may be deemed to have exercised its responsibilities under Article I, Section 8, clause 11 of the Constitution by implication from the passage of such collateral acts, or whether Congressional will in the area of war and peace must be manifested by an explicit, formal, Congressional act.[4] The issue of whether the Constitution permits this nation to drift deeper and deeper into a bloody war without some formal,

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[4] Petitioner does not contend that such a formal Congressional act must be couched as a declaration of war. Petitioner does contend, however, that such an act must be an unequivocal, explicit exercise of Congressional power designed to express its assent to the conduct of large scale military operations.

explicit, manifestation of Congressional approval is among the most critical ever presented to this Court.

A. *The Doctrine of "Implied Exercise" of the Congressional War Power Would Dilute, and Perhaps Destroy, the Responsibility of Congress to Be the Ultimate Arbiter of War and Peace*

The text of Article I, Section 8, clause 11 leaves no room for doubt that it was intended to shield the nation from the threat of improvident military operations initiated by the Executive. The debates surrounding the drafting of the war power clause reinforce the notion that its primary purpose was to disable the Executive from entangling the nation in war without the express, formal approval of Congress. E.g., Farrand, *Records of the Federal Convention*, Vol. II, 318-319 (1911) (remarks of Elbridge Gerry); Morris (ed.), *Alexander Hamilton and the Founding of a Nation*, 256 (1957).

The language of the Consfitution as originally set forth by the framers does not come before this Court as a matter of first impression. Nearly two hundred years of our history have given life and definite scope to the language of the Constitution. The Executive has the power to initiate certain limited forms of military activities, along with the more general power to repel direct attacks on the United States. Included in the limited emergency instances are numerous cases where the President temporarily used military force to protect American citizens or property located in foreign countries, or to commit reprisals against politically unorganized bandits or pirates. However, until Korea and Vietnam, never in the nation's history had an Executive ordered American troops into prolonged combat in the

absence of an explicit, formal, Congressional authorization.[4a]

The power of Congress to declare war has also been given more certain meaning by the course of events. The power, as it has evolved, has not been restricted to an inflexible and mechanistic requirement that the talismanic words "We declare war" be uttered. As it has become understood and applied, the declaration power is a flexible, yet formal, instrument to be used by Congress to give precise, unequivocal authorization to the President and to set guidelines concerning the purpose and scope of military hostilities to be conducted by the President.[5]

The court below ignored the constitutional text, the constitutional debates and the historic development described above which made clear that explicit, as opposed to implied, Congressional action was constitutionally required to authorize war.

[4a] Explicit, formal, Congressional authorization was granted in connection with the War of 1812 (2 Stat. 755); the Mexican War of 1846-1848 (9 Stat. 9); the Spanish American War of 1898 (30 Stat. 738); World War I (40 Stat. 1); WWII (55 Stat. 795); and the prosecution of the Civil War (12 Stat. 326).

[5] In addition to declaring war five times and explicitly granting the President broad powers to fight the Civil War, Congress has *explicitly authorized* the Executive to use the armed forces on numerous occasions which fell far below the levels reached in Vietnam. The naval war with France, waged from 1798-1801, was authorized by explicit Congressional resolution. 1 Stat. 561; 1 Stat. 572, extended 2 Stat. 39 (April 22, 1800); 1 Stat. 574; 1 Stat. 578; 1 Stat. 743; see discussion in *Bas* v. *Tingey*, 4 Dall. 37. (1800); *Talbot* v. *Seeman*, 1 Cranch 1 (1801). The naval war against Tripoli (1802) was authorized by explicit Congressional resolution. 2 Stat. 129. The naval war against Algiers (1815) was authorized by explicit Congressional resolution. 3 Stat. 230 (March 3, 1815). See also 5 Stat. 355, 11 Stat. 370, 26 Stat. 675, 38 Stat. 770, 69 Stat. 7 for other examples.

B. *The Doctrine of "Implied Exercise" of the War Power Would Jeopardize the Separation of Powers Between the Executive and the Legislature*

The framers of the Constitution intended that this nation not go to war unless the Congress first decided that we should. If the President can take the nation into war without an explicit Congressional authorization, and if that war is constitutional merely because Congress appropriates money in connection with its prosecution, then the President, not the Congress, will have the power to make the initial decision to go to war, and the Congress will be reduced to merely having a veto power to stop what the Executive has done. Since the Congress' role will be reduced to merely vetoing a war it does not like, the constitutional scheme by which the Congress has the lawmaking power and the President the veto power is reversed.

Moreover, once the President has placed troops in the field, Congress cannot, as a practical matter, deny the appropriations necessary to avert their slaughter. Is Congress to refuse them guns or bullets or replacements? To pay the bill for an Executive *fait accompli* does not provide the independent, unfettered, clear cut Congressional exercise of the war power which the Founding Fathers envisioned as a protection against improvident military adventures by the Executive.

Furthermore, under the theory adopted by the court below, the opponents of a given war would be saddled with the necessity of marshalling a majority in favor of restrictive amendments in order to stop the war. It is absolutely inconsistent with the plain meaning of Article I, Section 8 to impose upon Congress the onus of marshalling a majority in order to veto an Executive war rather than requiring the Executive to marshall a majority to authorize it.

Indeed, to impose such a requirement on Congress makes it far easier for the President to initiate a large war rather than a small one. The greater the step taken by the President, the more troops he commits to combat, the stronger is the pressure on Congress to vote for their continued support. The legislature might be willing to cut off funds for a small expeditionary force, knowing that the President can easily extricate them. But it would find it impossible to do so when hundreds of thousands of troops are committed to battle.

The problem is not merely one of the form of legislation, simply a "choice . . . between an explicit declaration on the one hand and a resolution and war-implementing legislation on the other," as the Second Circuit assumed in *Orlando, supra.* Appropriations acts are different in quality, purpose, and effect from the type of explicit authorizing legislation required by the Constitution.

They are different in quality because an explicit legislative act permitting the Executive to wage war forces each Congressman to face up to his most awesome constitutional responsibility. By requiring Congress to vote on an act *explicitly authorizing war,* the Constitution forces each Congressman to confront the most serious step he can possibly take with respect to the lives and fortunes of his fellow citizens and to decide whether such a course of action is in the best interests of the nation.[6] The people are also brought to realize what is to be expected of them.

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[6] Such a step was never taken with respect to the Vietnam war. Congressman Donald Riegle recently said on the floor of Congress:

> "Everyone in this Chamber knows that we have not had one vote on the war in Vietnam in either the House or the Senate in the last 10 years, and I mean a direct 'yes' or 'no' vote on the war in Vietnam. We even hide the money for the war

A military appropriations bill has none of these attributes. The purpose of a spending bill is always varied. A lump authorization or appropriation bill may provide for development of new weapons or an increase in soldiers pay or construction of needed ships or docks or planes. How can a Congressman decide that he does or does not want the nation to go to war when he votes on military spending? How can anyone say that the enactment of a general defense appropriation bill manifests an intent to authorize all military activity in which the nation may be currently involved?

C. *The Doctrine of "Implied Exercise" of the War Powers Renders It Virtually Impossible for the Electorate to Pass Judgment on the Performance of Their Representatives*

Article 1, Section 8, clause 12 provides that no military appropriation may extend for more than two years. Since the entire House of Representatives and one-third of the Senate must stand for re-election every two years, the Founding Fathers obviously intended to create an ultimate electoral check upon any Congressional determination that a war was advisable. Thus, any rule of constitutional law which would permit Congress to exercise its war power by implication from collateral acts in a manner not capable of ready public understanding as to the respective position of individual legislators on the war itself would frustrate the constitutional scheme. The electorate would then be deprived of its opportunity to pass biennial judgment upon each legislator's position on the war.

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in Vietnam in the Defense appropriation so that we do not have to have a specific vote on the issue." 117 *Cong. Rec.* H3442 (daily edition, May 4, 1971).

It is, of course, impossible to discern from the voting patterns of individual legislators on appropriations bills or draft extensions their individual positions on the Vietnam war. The most vociferous critics of the war, moved by extraneous considerations, have consistently voted to pay the bill. Permitting "implied exercise" of the war power by Congress would be analogous to providing that a vote on the advisability of the war be taken in closed session, with the totals publicly announced, but individual votes kept secret. The result in both cases would be to rob the electorate of any meaningful ability to pass judgment on their respective representatives.

III.

None of the Congressional actions cited by the court below amounts to Congressional authorization of the Vietnam War.

To show Congressional authorization of the Vietnam War the court below primarily relied upon the numerous appropriations bills passed to support the war. It also cited the extension of the draft law and other ancillary Congressional action which recognized the state of war in Vietnam.

The operative language of the appropriations bills relating to the Vietnam War is laid out at Appendix B, pp. 7a-11a. (Although twenty authorization and appropriation bills were passed, one of the three formulas appears in each of them.) It is clear that the language cannot be construed as an authorization of war.

The first formula (P.L. 89-18, Appendix B, p. 10a) falls far short of any grant of authority to fight in Vietnam.

Vietnam is not even mentioned. By discussing "military activities in Southeast Asia," does the bill authorize an American invasion of Indonesia, or Burma, or Singapore? Would it permit an atomic attack on southern China which certainly lies "in Southeast Asia"? Clearly, the language lacks the precision one would hope for in an authorization of war.

The second formula (P.L. 89-367, Appendix B, pp. 10a-11a) is hardly better. On its face it simply permits military support of Vietnamese and other forces in Vietnam. But such support can be by shipment of weapons only. There is nothing in the language which explicitly authorized American forces themselves to be used. The vague formula found in this law is often used in foreign assistance laws where actual use of American troops is not contemplated. Thus the Foreign Assistance Act of 1961 (P.L. 87-195, 75 Stat. 424, September 4, 1961) authorized the President "to furnish military assistance . . . to any friendly nation, the assisting of which the President finds will strengthen the security of the United States." (Sect. 503.) Using the court's interpretation of the appropriations acts, these words would permit the President to begin a war anywhere he chose at any time as long as he could find a "friendly nation" to assist. Clearly Congress had no such thought in mind.

The third formula (P.L. 90-5, Appendix B, p. 11a) was used only once. Its legislative history makes clear it was not designed to have any substantive significance. 113 *Cong. Rec.* 4941 ff., 5115 ff.

At the very outset of the Congressional debates on Vietnam authorization and appropriations bills, key Congressional figures made clear that such bills were *not* to be

considered as determining policy in any way or as authorizing any military moves by the Executive. This view was constantly expressed by Congressional leaders both supporting and opposing the government's war policy. E.g., Remarks of Senator Richard Russell, 112 *Cong. Rec.* 3135 (Feb. 16, 1966).

Nor can passage of the draft extension acts be considered as an authorization of the war. We have had a draft law continuously since 1948 extended by Congress in 1951, 1955, 1959, 1963 and 1967. No one has ever contended that passage of such laws gave the Executive *carte blanche* powers to use conscripted forces in any way he chose.

IV.

The revelations in the Pentagon Papers undermine an important basis of the *Orlando* case.

In the summer of 1971 important documentary evidence on the origins of the Vietnam war came to light. Published first in The New York Times and subsequently in book form under the title *The Pentagon Papers*, these documents show that the "mutual participation" between Congress and the Executive of which the Second Circuit spoke was in fact non-existent.[7] Covert military actions against

[7] The court below did not consider information in the Pentagon Papers because they "were not a part of the record in this case, nor was there evidentiary material in support of their authenticity." However, the government has never questioned the authenticity of the documents in question and it has now officially released them in an edition published by the Government Printing Office. As official government documents, they can be considered as fully by this Court as any other government publications. Moreover, the documents involved were before the court below as part of the record in *United States* v. *New York Times*, —— F.2d —— (2nd Cir. 1971). Thus, the refusal of the Second Circuit to even consider the documents appears to have been absolutely unjustified.

North Vietnam, of which neither Congress nor the public were informed, began as early as 1963, under the code name of Operation 34A. (See pp. 239-240 and Document No. 61, *The Pentagon Papers*, Bantam Ed. 1971.) The Gulf of Tonkin Resolution itself was drafted by the State Department in May, 1964 many months before the actual Gulf of Tonkin incident. (See Document No. 66, *ibid.*) The American destroyers in the Gulf of Tonkin in August, 1964 were gathering information for Operation 34A actions against North Vietnam. (*Ibid.* p. 240.) Contingency plans for the bombing of North Vietnam and the shipment of American troops were prepared by the Joint Chiefs of Staff as early as January, 1964 long before there was any pretext of North Vietnamese attacks upon American forces. (Document No. 62, *ibid.*) In September, 1964 a "scenario" was prepared by an Assistant Secretary of Defense whereby the North Vietnamese would be provoked into taking action against United States forces which could be used as justification for even greater American escalation. (Document No. 79, *ibid.*)

These documents show that the initiative for American military moves in Vietnam was always made by the Executive Department without any consultation with Congress, indeed often with an attempt to deliberatively deceive Congress.[8] Even after the war had increased in scope, Con-

[8] One example of Congressional deception was cited by Senator George S. McGovern. Secretary of Defense Robert S. McNamara told the Senate Foreign Relations Committee in secret session at the time of the Tonkin Gulf Resolution that the American Navy "played absolutely no part in, was not associated with, was not aware of any South Vietnamese actions . . ." in the Tonkin Gulf area. But the program of covert military operations against North Vietnam in the Gulf, though manned by South Vietnamese, was planned and financed by our government. See 117 *Cong. Rec.* E 6054 et seq. (daily ed. June 17, 1971).

gress was kept in the dark on the Executive's plans for further escalation. Congressman George Brown of California said on March 1, 1966: "Not once has Congress been asked to vote on these decisions (on further escalation) prior to their being taken." 112 *Cong. Rec.* 4465.

It is impossible to speak of "mutual participation" between the Executive and Congress under these circumstances. Once American troops were committed to battle, Congress had no choice but to supply them with weapons and material to defend themselves. But given the pattern of secrecy and deception practiced upon Congress by the Executive as revealed by the Pentagon Papers, this *post-hoc* appropriation of funds cannot conceivably be considered the independent exercise of the war power required by the Constitution as a check upon unbridled Executive military action.

V.

The Executive may not employ conscripts to wage war in the absence of explicit Congressional authorization of the war.

At best, serious doubts exist concerning the constitutionality of military conscription in the absence of an express authorization of hostilities by Congress. See, Friedman, *Conscription and the Constitution*, 67 Mich. L. Rev. 1493 (1969). However, even if one assumes constitutional validity of the "peacetime draft," it is quite another matter to permit the Executive to deploy "peacetime draftees" in major combat operations in the absence of explicit Congressional authorization. While it may be permissible for an Executive to deploy volunteers in military combat

operations which have received, at most, only implied Congressional approval, it is intolerable to permit the Executive to utilize the manpower marshalled by a peacetime draft as cannon fodder for a war which Congress has never explicitly authorized.

The deprivation of personal liberty inherent in a system of peacetime military conscription cannot be escalated into a potential deprivation of life itself in the absence of an express Congressional act. A free society simply lacks the power to compel its citizens to risk their lives in military combat in the absence of an explicit, unequivocal Congressional finding that such a drastic step is necessary. Thus, unless and until Congress expressly authorizes the use of conscripts in Vietnam, the Executive may pursue its Indochinese adventure, if at all, only with men who volunteer for combat in Vietnam.

VI.

Petitioner may not be deployed in Vietnam except in compliance with PL 92-129 and PL 92-156.

In response to the decisions of the United States Court of Appeals for the Second Circuit in *Berk* v. *Laird*, 443 F.2d 1039 (2nd Cir. 1971) and *DaCosta* v. *Laird*, 448 F.2d 1368 (2nd Cir. 1971), Congress enacted legislation in connection with the 1971 Selective Service Act and the 1971 Armed Forces Appropriation Act expressly declaring it to be "... the policy of the United States ... to terminate at the earliest practicable date all military operations in Indochina ... subject to the release of all American prisoners of war." PL 92-156. However, the Executive has explicitly repudiated the legislation, stating:

"To avoid any possible misconceptions, I wish to emphasize that section 601 of this act—the so-called 'Mansfield Amendment'—does not represent the policies of this administration. Section 601 urges that the President establish a 'final date' for the withdrawal of all U.S. forces from Indochina, subject only to the release of U.S. prisoners of war and an accounting for the missing in action.

Section 601 expresses a judgment about the manner in which the American involvement in the war should be ended. However, it is without binding force or effect, and it does not reflect my judgment about the way in which the war should be brought to a conclusion. My signing of the bill that contains this section, therefore, will not change the policies I have pursued and that I shall continue to pursue toward this end."[5]

In *Massachusetts* v. *Laird*, —— F.2d —— (First Cir. 1971) (Docket No. 71-1177), the First Circuit followed the *Orlando* case and ruled that Congress had impliedly authorized the Vietnam war by its "supportive" legislation. However, the Court stated:

"The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. *Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court*

[5] Statement on November 17, 1971, Weekly compilation of Presidential Documents, November 22, 1970, p. 1531.

might well take a different view." (Slip opinion at p. 13) (emphasis added).

The Executive's repudiation of Congress' opposition "to the continuance of hostilities" brings us to precisely the point described in the *Massachusetts* opinion. Whatever the issues might have been in the past, we are now confronted by a situation in which the Executive and the Legislature have expressed conflicting positions concerning the continuation of hostilities in Vietnam. It is, therefore, incumbent upon the judiciary to delineate the "boundaries" of their respective constitutional responsibilities.

The basic issue is whether the Executive, having consistently argued that Congressional actions granting "the sinews of war" constituted implied approval of the war in Vietnam, may now ignore explicit Congressional directions that the war is to be terminated immediately upon the release of American prisoners of war.

In *Berk* v. *Laird*, 429 F.2d 302 (2nd Cir. 1970), the Second Circuit stated:

> "If the executive branch engaged the nation in prolonged military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discernible standard calling for some mutual participation by Congress in accordance with Article I, Section 8." 429 F.2d at 305.

By repudiating the Mansfield Amendment, the Executive has gone beyond the situation described in *Berk*, for its current actions in Vietnam are not merely without authorization by Congress, but are in direct violation of express Congressional will.

CONCLUSION

The consequences of continued silence by this Court on the Vietnam war can only be confusion, unrest, and continued uncertainty. Until constitutional responsibility is firmly fixed by this Court, millions of Americans will question the Constitutional legitimacy of any military action that the government may take in the future. The nation deserves a final answer to these questions which have so troubled and perplexed our society.

For the reasons set forth above the petition for certiorari should be granted.

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